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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1018

ROOSEVELT JOHNSON AND ANTHONY BUCKNER,
Petitioners,

versus

UNITED STATES OF AMERICA and
PANAMA CANAL COMPANY,
Respondents.

Petition For a Writ of Certiorari To The
United States Court of Appeal For The Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit entered in the above entitled cases on November 7, 1968.

CITATIONS TO OPINIONS BELOW

There was no written opinion in the District Court. The opinion of the United States Court of Appeals for

the Fifth Circuit is reported in 402 F 2d 778 and is reproduced, *infra,* as Appendix A.

JURISDICTION

The Judgment of the Court of Appeal is dated November 7, 1968 and was entered on November 7, 1968. There was no application for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether employees of the Panama Canal Company, generally, had the right to sue their employer prior to the passage of the Federal Employees Compensation Act and, if they did have such right, whether, in the case of seamen, a right to sue under the General Maritime Law survived the enactment of the exclusive liability section of the compensation act.

STATUTES INVOLVED

> "The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or

such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel." 5 U.S.C. § 757(b) page 370 (1958 edition) (Now 5 U.S.C. § 8116); 63 Stat. 861; 5 U.S.C.A. § 8116(c), page 456 (1967 ed.) (wording slightly varied).

"Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel." 5 U.S.C. § 791-4, page 384 (1958 edition); 63 Stat. 868; 5 U.S.C.A. § 8150 (a) (1967 ed.) (wording slightly varied).

STATEMENT OF THE CASE

This case commenced as two separate suits in the United States District Court for the Eastern District of Louisiana. Each suit was brought by a seaman employed by the Panama Canal Company against the Panama Canal Company and the United States seeking damages for personal injury alleged to have been incurred aboard vessels of the Panama Canal Company in the course and scope of their employment. Rule 9(h) of the Federal Rules of Civil Procedure was pled in each case and the admiralty jurisdiction of the District Court, 28 U.S.C.A. § 1332, was invoked under the

General Maritime Law, the Suits in Admiralty Act, 46 U.S.C. § 741 et seq. and the Public Vessels Act, 46 U.S.C. § 781, et seq.

The United States and the Panama Canal Company moved for summary judgment invoking the exclusivity provision of the Federal Employees Compensation Act cited above as 5 U.S.C. § 757 (b). The motions were granted in each case. An appeal was perfected in each. The Court of Appeals heard the cases jointly and rendered a joint opinion affirming the District Court in each case finding that Panama Canal Company seamen possessed no greater rights than federal seamen generally.

The issue presented to the Court of Appeal concerned only the right to maintain the suit under the General Maritime Law against the Panama Canal Company.

REASONS FOR GRANTING THE WRIT

(1) This writ should be granted in order to give effect to the seamen's savings clauses of the Federal Employees Compensation Act in one of the few situations where these clauses have meaning. The Panama Canal Company (formerly Railroad and now Corporation) operates a number of ocean going vessels in commerce. It has numerous seamen employed by it. Rights traditionally owned by these seamen and saved to them by Congressional enactment have been destroyed in the Fifth Circuit by the failure to answer the question: Did these seamen have rights to be preserved by Congress?

In failing to find that they did have such rights the lower court did not consider the effect of *Gardner vs. Panama R.R. Co.*, 342 U.S. 29 (1951). The lower court in failing to make the relevant inquiry, did the men have rights to preserve, failed to follow the *ratio decidendi*, of *Patterson vs. United States*, 359 U.S. 495 (1959) and *Johansen vs. United States*, 343 U.S. 427 (1952).

(2) The Supreme Court has not yet decided what the rights of Panama Canal seamen were prior to the exclusivity provision of the compensation act. This Court has decided that some other classes of government seamen did not benefit from the savings clauses of the exclusivity provision because they had no rights outside of compensation in any event, the government, generally speaking, being immune from suit. See *Johansen vs. United States*, 343 U. S. 427, 439-40 (1952).

But employees of the Panama Canal Company have had the right to sue their employer. *Panama R.R. Co. vs. Minnix*, 282 F.47 (5th Cir. 1922), is an example.

In *Gardner vs. Panama R.R. Company*, 342 U.S. 29, 32 (1951), in a case involving a vessel passenger, this Court held that the Panama Canal Company cannot claim sovereign immunity by finding the "amenability of the Company to suit in the ordinary course."

The history of the Panama Canal Company as set forth in *Cordero vs. Panama Canal Co.*, 170 F. Supp 234 (S.D.N.Y. 1959), where the seaman was allowed to sue, and the *Gardner* opinion impel a conclusion that

the seamen petitioners had rights to preserve and, so concluding, the lower court made obvious error.

(3) This case is important because the granting of this writ will permit an answer to the question, did these seamen and all others of like situation have rights to preserve. What the lower court has done is hold that the rights of these seamen do not exist because the Supreme Court has found that no federal employees have rights outside of compensation. This the Supreme Court has not done. Substantive rights are not so easily destroyed. These petitioners and all others similarly situated, pose a question which, when answered, will recognize their right to sue, give effect to the acts of Congress and carry foreward the logic of prior opinions of this Court.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

William L. McGovern
1229 Nineteenth Street, N.W.
W shington, D.C.

CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME the undersigned authority personally came and appeared CLIFTON S. CARL, who after first being duly sworn did depose and say:

That a copy of this petition has been served upon all opposing counsel of record by depositing same in the United States Mail, postage prepaid to their respective office addresses, and an additional copy has been served upon the solicitor general of the United States by depositing same in the United States Mail, postage prepaid, to his office in Washington, D.C.

_____

CLIFTON S. CARL

SWORN TO AND SUBSCRIBED
BEFORE ME THIS ___ DAY
OF _____, 1969.

_____

NOTARY PUBLIC

APPENDIX A

PER CURIAM: The appellants, Roosevelt Johnson, (No. 25485), and Anthony Buckner, (No. 25486), brought suit against the appellees under the General Maritime Law, the Public Vessels Act, 46 U.S.C. 781, et seq., and the Suits in Admiralty Act, 46 U.S.C. 741, et seq. seeking recovery for injuries allegedly sustained in the course of their employment as federal employees aboard the SS CRISTOBAL, a vessel owned and operated by the Panama Canal Company, a wholly owned agency and instrumentality of the United States. The United States District Court for the Eastern District of Louisiana granted a motion for summary judgment in favor of the Government and dismissed the complaints on the ground that the exclusive remedy of the appellants against the United States was under the Federal Employees Compensation Act, 5 U.S.C. 751, et seq.[1]

Our decision in this case is controlled by decisions of the Supreme Court and prior decisions of this court which we consider to be clearly dispositive of the issue presented. These decisions compel the conclusion that a seaman who was injured in the course of his employment as a federal employee of the Panama Canal Company, a federal instrumentality, is limited to the benefits provided under the terms of the Federal Employees Compensation Act and, therefore, such seaman may not maintain a suit for damages against the Government. *Johansen vs. United States,* 343 U.S.

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[1]By statute the section designations have been changed to 5 U.S.C. 8101, et seq.

427 (Public Vessels Act); *Patterson vs. United States,* 359 U.S. 495 (Suits in Admiralty Act); *Jarvis vs. United States,* 342 F.2d 799 (C.A. 5), affirming Petition of United States, 212 F.Supp. 214 (E.D. La.), cert. den. 282 U.S. 831 (Suits in Admiralty Act); *Suhar vs. United States,* 351 F.2d 952 (C.A. 5) (general maritime law); *Aho vs. United States,* 374 F.2d 885 (C.A. 5), cert. den. 389 U.S. 930 (libel in admiralty). The *Johansen* and *Patterson* decisions have been reaffirmed recently. *Amell vs. United States,* 384 U.S. 158 at 160-161; *United States vs. Demko,* 385 U.S. 149, at 151-152.

The judgment is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1018

ROOSEVELT JOHNSON and ANTHONY BUCKNER,
PETITIONERS

v.

UNITED STATES OF AMERICA and
PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court is unreported. The opinion of the court of appeals (Pet. App. 8-9) is reported at 402 F. 2d 778.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1968. The petition for a writ of cer-

tiorari was filed on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injured seamen employed by the Panama Canal Company (a federal instrumentality) and thus entitled to the administrative benefits of the Federal Employees Compensation Act may sue the United States for additional damages.

STATEMENT

Petitioners instituted these two actions under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, to recover damages for injuries allegedly sustained in the course of their duties as seamen aboard the SS CRISTOBAL. That vessel is owned and operated by the Panama Canal Company, incorporated pursuant to the Act of June 29, 1948, 62 Stat. 1075, under federal charter as a wholly-owned agency and instrumentality of the United States.

The district court granted summary judgment for the government on the ground that petitioners are federal employees limited to the benefits provided by the Federal Employees Compensation Act and therefore may not maintain suits for damages against the Government. The court of appeals unanimously affirmed (Pet. App. 8-9).

ARGUMENT

The decision below correctly applies this Court's settled interpretation of the impact of the Federal

Employees Compensation Act and is not in conflict with the decision of any other court of appeals.

The Federal Employees Compensation Act, 5 U.S.C. (Supp. III) 8101-8150,[1] provides a remedy for injuries incurred by Government employees in the performance of their duties. It covers employees of the Panama Canal Company (5 U.S.C. 8101(1)(A); see 5 U.S.C. 8146), and has done so since its enactment in 1916 (39 Stat. 742, 750).

This Court and the courts of appeals have consistently held that federal employees covered by the Compensation Act, and particularly federally employed seamen, are precluded from seeking damages against the United States or its instrumentalities under any general tort or liability statute. *Johansen* v. *United States*, 343 U.S. 427 (Public Vessels Act); *Patterson* v. *United States*, 359 U.S. 495 (Suits in Admiralty Act); *Jarvis* v. *United States*, 342 F. 2d 799 (C.A. 5), certiorari denied, 382 U.S. 831 (Suits in Admiralty Act); *Suhar* v. *United States*, 351 F. 2d 952 (C.A. 5) (general maritime law); *Aho* v. *United States*, 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930 (libel in admiralty). The settled principle of the *Johansen* and *Patterson* decisions was recently reaffirmed by this Court in *Amell* v. *United States*, 384 U.S. 158 at 160-161, and again in *United States* v. *Demko*, 385 U.S. 149, at 151-152.

This Court held in *Johansen* v. *United States*, *supra*, 343 U.S. at 435-438, that the savings clauses relating to the rights of seamen introduced into the Compen-

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[1] Formerly 5 U.S.C. 751-803.

sation Act in 1949,[2] upon which petitioners rely, gave seamen no affirmative rights, but merely assured that the other 1949 amendments to the Act would not affect any rights that federally employed seamen might previously have had apart from the Act. These clauses "do not even reflect a belief on the part of Congress that the remedy of compensation is not exclusive. * * * If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now." *Id.* at 438. And, as noted, the Court held that suits seeking additional remedies were, in fact, precluded by the longstanding comprehensive statutory scheme.

Petitioners contend that the effect of the Compensation Act upon employees of the Panama Canal Company should be different from its effect on employees of other federal instrumentalities because the Company, unlike the government generally, is subject to suit. In this regard, they rely upon *Gardner* v. *Panama R. Co.*, 342 U.S. 29. *Gardner*, however, involved a suit not by a federal employee but by an ordinary passenger on the Company's steamship, who was in no way affected by the Compensation Act. And *Cordero* v. *Panama Canal Co.*, 170 F. Supp. 234 (S.D. N.Y.), which did give a seaman rights such as petitioners claim here, was expressly overruled in *Mills* v. *Panama Canal Co.*, 272 F.2d 37 (C.A. 2), certiorari denied, 362 U.S. 961. In *Mills*, the Second Circuit held that a seaman on the very ship involved in the present case was barred from maintaining a tort suit

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[2] 5 U.S.C. 8116(c), 8150(a).

against the Company for work-connected injuries. The *Mills* decision and the decision of the Fifth Circuit in the present case are thus in complete agreement, and were correctly decided. The fact of the Company's amenability to suit in other types of cases is irrelevant to the impact of the comprehensive scheme established by the Compensation Act; since the Act applies to Company seamen exactly as it does to seamen employed by other agencies of the United States, it bars tort suits by Company seamen exactly as it bars such suits by other government seamen.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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MARCH 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 335255 534